BEATRICE RAMANATHAN (F) & ANOR.

v.

SHAH ALAM PROPERTIES SDN. BHD. & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
DATO' LIM BENG CHOON J.
[CIVIL SUIT NO. P55 OF 1982 & P54 OF 1982]
25 JANUARY 1994

TORT : Plaintiffs properties damaged by severe flooding and water-logging - Defendants admitting liability - Parties entering into consent order - Consent order reserving second plaintiff's claim for devaluation of property - Assessment of damages for diminution in value of property - Principles applicable.

The plaintiffs properties were devastated by severe flooding and water-logging which the plaintiffs alleged were caused by the nuisance and negligence of the defendants. The parties reached an out of Court settlement and entered into a consent order. The consent order reserved the question of the devaluation of the second plaintiffs property.

The question that arose on the hearing for damages for devaluation was whether the second plaintiff was entitled to damages for diminution in the value of her property or whether she was only entitled to a reasonable sum for re-instatement of her property.

Held:

[1] The two basic principles of law relating to the calculation of the measure of damages for torts affecting land are well settled and they are that;

(i) whenever damages are to be awarded to a plaintiff then those damages will be such as will, so far as money can, put the plaintiff in the same position as he would have been in had the tort not occurred; and

(ii) the damages to be awarded are to be reasonable as between the plaintiff on the one hand and the defendant on the other.

[2] In order to achieve the general object underlying the rules for the assessment of damages in the case of a tort causing damage to real property, the Court is required to apply one or the other of two quite different measures of damage. The first is to adopt the diminution in value to the plaintiff and the second is to adopt the actual cost of repair or reinstatement. Which measure is appropriate will depend on a number of factors.

[3] Be that as it may, the diminution in value is the true measure of damage if and only if the plaintiff is selling or reasonably intending to sell the property in its damaged state or where it can be established that the plaintiff is holding on to the property merely for investment purposes. On the other hand if the plaintiff intends to continue to occupy the property and to repair the damage, the proper measure is the cost of all such repairs.

[4] In the present case the second plaintiff had elected to occupy the property and to carry out all necessary repairs. The ownership and possessory rights attached to such ownership still remain with her. The evidence adduced in the present case dehorts any suggestion that the second plaintiff is merely holding on to the premises as an investment.

[5] Under the circumstances the proper measure of damages to apply in the present case is to take the costs of all repairs and reinstatements and not the loss arising from the diminution in the value of the property.

[6] The second plaintiff had given evidence about the cracks caused to the toilet bowls as a result of the floods occurring in 1989, the costs of repairs of which were therefore not included in the consultant engineer's report (exhibit P2). In the circumstances the second plaintiff should be paid for the repairs or replacement of the toilet bowls.

[Orders accordingly. Parties ordered to pay their own costs].

Cases referred to:
Dodd Properties (Kent) Ltd. & Anor. v. Canterbury City Council & Ors. [1980] 1 All ER 928 ***(cit)***
C.R. Taylor (wholesale) Ltd. & Ors. v. Hepworth Ltd. [1977] 1 WLR 659 @ 667 ***(refd)***
Hole & Son (Sayers Common) Ltd. v. Harrisons of Thurnscoe Ltd. [1973] 1 Lloyd's Report ***(refd)***
Jones v. Gooday [1841] 8 M & W 146 ***(refd)***
West Leigh Colliery Company Limited v. Tunnicliffe & Hampson Limited [1908] AC 27 ***(refd)***

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 12, para 1168
McGregor on Damages, 13th Edn., p. 711

For the plaintiff - R.K. Nathan; M/s. R.K. Nathan & Co.
For the defendant - Prasad Abraham; M/s. Prasad Abraham & Associates

JUDGMENT

Lim Beng Choon J:
By this action the 1st and 2nd plaintiffs alleged in their joint statement of claim that their properties known as 15 and 16 Jalan Beverley Ukay Heights, Kuala Lumpur respectively were devastated by the severe floodings and water-logging which occurred between August and November 1981 and again between February and March 1982 as a result of nuisance and negligence on the part of the defendants and/or their servants or agents. There was also another suit CS No. 54 of 1982 filed by 7 plaintiffs who also alleged that their respective properties located around the area were similarly devastated. The defendants originally elected to deny liability and to resist all claims. Apparently they were advised against the adopting of such a stand and they accordingly admitted liability and proceeded to negotiate with all the plaintiffs in both the civil suits for a settlement out of Court. As a result of the negotiation all parties agreed to the consent order issued by the Court on 29 October 1987 (enclosure 44) setting out the terms of the settlement. The 1st plaintiff in this action and all the 7 plaintiffs in CS 54 of 1982 agreed to and did accept lump sum payments as specified in the said consent order. The 2nd plaintiff in this action also agreed and did accept a sum of "RM42,000 as special damages with the question of devaluation to be decided by Court." The issue of "devaluation" as posed by 2nd plaintiff was heard by me on 31 October 1990. The hearing was concluded only on 27 July 1993.

I shall now advert to the submissions of the learned Counsel for the defendants. In this connection I should mention that as the defendants have admitted liability the Counsel for the 2nd plaintiff should, pursuant to procedure, make his submission first. However by consent of the parties the right to begin was given to the Counsel for the defendant.

The gist of Counsel's submission is that:

(1) The relief which the 2nd plaintiff can ask for is either for reasonable re-instatement or for diminution in value of the plaintiff's property. She cannot ask for both reliefs. The case of *Dodd Properties (Kent) Ltd.* [1980] 1 All ER 928 is cited to support this contention.

(2) In the present case as the plaintiff was and still is in occupation of the house and has no intention of selling it she is therefore entitled to re-instatement that is to say she is entitled to costs of repairs to the property and no more. In any event by virtue of the consent order a sum of RM42,000 had already been paid to her as special damages for the purpose of carrying out all the repairs as specified in P2, ("the Chester Ho's report"). It was on the basis of the Chester Ho's report that the consent order was made.

(3) Alternatively in the event that the sum of RM42,000 was not sufficient to carry out all the repairs the plaintiff must show that the sum of RM42,000 was not enough to restore the plaintiff's property to its original position but that she is entitled for the element of diminution in value of her property. Be that as it may, it is further contended that had the plaintiff carried out the recommendations made in Chester Ho's Report, to prevent further flooding, she has no grounds to complain. After all Mr. Chester Ho was at all material times the plaintiff's consultant engineer.

(4) In any case the report (P3) of the valuer Mr. Thn'g employed by the plaintiff contains a highly exaggerated figure to boost the open market value of her property in that he based his valuation on wrong premises and more importantly there was no basis for him to use the comparative value to arrive at the current market value of her property when there was no or no sufficient contemporaneous sales of properties in or around the area at the material time to enable Mr. Thn'g to use for purpose of comparison.

(5) Furthermore the valuation made in the Thn'g's report has been neutralised by the evidence of the defendant's valuer one D.B. Das Gupta (DW1) who has clearly revealed the patent defects of Thn'g's assertions and conclusions.

Based on the above contention Counsel for the defendant therefore suggested that the plaintiff's claim must be rejected. If the Court is not with him then he suggested that whatever damages awarded by the Court must be reduced by the sum of RM42,000 awarded earlier to the plaintiff.

Counsel for the plaintiff in his submissions raised the following points:

(a) Damage assessed on the diminution in value of properties is distinguishable from the damage assessed on the costs of repairs to properties and there is occasion when the Court can award damage based on the combination of these 2 heads of damages.

(b) The payment of the sum of RM42,000 pursuant to the consent Court order is for special damages and it is expressedly stated that the issue of devaluation of the properties was to be decided by the Court. The plaintiff is estopped from raising any objection to this issue.

(c) The plaintiff had carried out the repairs to her properties according to the Chester Ho's report but it did not prevent further floodings to the property.

(d) In any case the defendants as developer continued to develop the vicinity of the area from 1976 to 1986 or 1987 and it was these development works that caused extensive clearance of trees, shrubs and other vegetation which in turn caused the drainage system to be defective and/or the clogging up of the same.

(e) Thn'g has in compiling his report taken all material factors into consideration and it was based on these factors that he arrived at his conclusion.

(f) On the other hand, Das did not contend that Thn'g was wrong although he did assert that in arriving at the current valuation of the property Thn'g made his assessment based on 1987 market value when Thn'g's report was compiled. Das was wrong because in arriving at his conclusion of the market value at RM650,000 Thn'g had taken in consideration the prevailing market value of the property as at today. Das had not deemed it fit to give his opinion with regard to how much the property would fetch based on today's market value.

(g) Das has not personally visited the property in that he had never made a site inspection of the premises, the garden and the swimming pool. He merely relied on what was stated in the Thn'g's report to raise his criticisms.

(h) Das was wrong in relying on the Chester Ho's report to assess the value of the properties.

On the basis of the above points Counsel therefore submitted that the defence should be rejected and judgment be given to the 2nd plaintiff for the sum of RM90,000 being the diminution in the value of the said property.

It is appropriate at this juncture to examine the case law relating to calculation of the measure of damages for torts affecting land. Two basic principles of law have been well-settled by the authorities namely (i) that whenever damages are to be awarded to a plaintiff then those damages shall be such as will, so far as money can, put the plaintiff in the same position as he would have been in had the tort not occurred and (ii) the damages to be awarded are to be reasonable that is between the plaintiff on the one hand and the defendant on the other. These two principles apply equally well in cases of a breach of contract (see *C.R. Taylor (wholesale) Ltd. & Ors. v. Hepworth Ltd.* [1977] 1 WLR 659 @ 667). The element of reasonableness as between the plaintiff and the defendant is illustrated in the case of *Hole & Son (Sayers Common) Ltd. v. Harrisons of Thurnscoe Ltd.* [1973] 1 Lloyd's Report. There the plaintiffs had intended to demolish some cottages erected on a site which they intended to redevelop by building new and different premises. Unfortunately the defendant's lorry ran into them and caused extensive damage to the cottages. The plaintiffs' claim for the costs of reinstating the premises was rejected on the ground that to award them with the costs of re-instatement would have "put them in a better position than they would have been from a monetary point of view had the collision by the lorry never occurred **and would in any event clearly have been unreasonable as between the plaintiffs and the defendants."** The plaintiffs there were instead awarded the cost of temporary repairs of the cottages and any proved loss of rent.

The measure of damages in the amount of the diminution in value of the land was rejected in the ancient case of *Jones v. Gooday* [1841] 8 M & W 146 cited in **McGregor On Damages** 13 ed. p. 711. A similar approach was adopted by the House of Lords in the case of *West Leigh Colliery Company Limited v. Tunnicliffe & Hampson Limited* [1908] AC 27 where it was held as stated in the headnote that:

> In assessing the damages recoverable by a surface owner for subsidence owing to the working of minerals under or adjoining his property, the depreciation in the market value of the property attributable to the risk of future subsidence must not be taken into account. To recover damages the surface owner must wait until the damage or injury caused by subsidence has happened.

It is to be noted that there the plaintiff was claiming damages for the depreciation of the

premises at £13,200 when the actual costs of repairs were only in the sum of £1,300. In rejecting the plaintiff's claim for the higher sum Lord Ashbourne explained the principle on the assessment of damages for torts affecting land more explicitly; at p. 31:

> It was urged by the appellants that this large sum is mainly composed of an allowance for the risk of future damage, and that, as they must remain liable for any future subsidence if it occurs, they may thus have to pay twice over for the same loss. The excavations in themselves give no right of action. It is only the damage caused to the respondent's right of enjoyment of their property by a subsidence caused by the excavations that gives any right of action. Before any subsidence it might be that the known excavations and the fears resulting therefrom would cause a depreciation in the value of the property for which no action would lie. The fear of a subsidence, although founded on the known fact of extensive excavations, cannot give any cause of action, even although there may have been already a subsidence. This is clear from the two cases already referred to, and cannot now be questioned. If no action for interfering with the enjoyment of property can be brought before a subsidence, could it be urged that a comparatively small subsidence, the consequences of which could be repaired for far less than £1,300., would give a right to an inquiry for depreciation which might result in the large figure here awarded by the official referee? There is no secret about these large excavations. They are, I should think, always known to the owners and occupiers in the neighbourhood. There may be a certain amount of uneasiness in the minds of those whose lands are near or adjoin, but each party has clear rights. The mine owner can excavate all he thinks worth taking, subject to the risk of an action on the part of those whose enjoyment of their property he may interfere with, and those who are so interfered with may bring actions as often as a fresh subsidence takes place and their enjoyment of their property is so interfered with.

Reverting to the case of *C.R. Taylor Ltd. v. Hepworth Ltd. (QBD) (supra)*, I should mention that May J. in that case accepted the following statement appearing in **Halsbury's Laws of England** 4th Edn. Vol. 12 para 1168:

> The *prima facie* measure of damages for all torts affecting land is the diminution in value to the plaintiff **or** in the case of a plaintiff in possession with full ownership the cost of reasonable reinstatement.
>
> (Emphasis is mine).

In accepting the abovementioned statement May J. however added that given appropriate facts there might well be exceptions. May J. in that case held that the proper measure of damage to apply was the diminution in value to the plaintiffs simply because prior to the burning down of the billard hall, the plaintiffs had no intention to occupy the said hall or letting it out for occupation by others. They were "merely holding on to the premises in only one particular sense as an investment which might over the years show capital appreciation by way of increase in development value and that development value lay in the site itself not in the buildings whole or destroyed which had previously been erected upon it." In the circumstances it was held that it would not only be totally unrealistic but also unreasonable as between the plaintiffs and the defendants to award the former the notional cost of reinstatement of the billard hall.

One case which was referred to by Counsel for the defendant is *Dodd Properties (Kent) Ltd. & Anor. v. Canterbury City Council & Ors.* [1980] 1 All ER 928 @ 938 where Donaldson LJ said:

> The general object underlying the rules for the assessment of damages is, so far as is possible by means of a monetary award, to place the plaintiff in the position in which he would have occupied if he had not suffered the wrong complained of, be that wrong a tort

> or a breach of contract. In the case of a tort causing damage to real property, this object is achieved by the application of one or the other of two quite different measures of damage, or occasionally, a combination of the two. The first is to take the capital value of the property in the undamaged state and to compare it with its value in a damaged state. The second is to take the cost of repair or reinstatement. Which is appropriate will depend on a number of factors, such as the plaintiff's future intentions as to the use of the property and the reasonableness of those intentions. If he reasonably intends to sell the property in its damaged state, clearly the diminution in capital value is the true measure of damage. If he reasonably intends to continue to occupy it and to repair the damage, clearly the cost of repairs is the true measure. And there may be in between situations.

From the cases cited above, it is clear to me that in order to achieve the general object underlying the rules for the assessment of damages in the case of a tort causing damage to real property, the Court is required to apply one or the other of two quite different measures of damage. The first is to adopt the diminution in value to the plaintiff and the second is to adopt the actual cost of repair or reinstatement. Which measure is appropriate will depend on a number of factors. Be that as it may the diminution in value is the true measure of damage if and only if the plaintiff is selling or reasonably intending to sell the property in its damaged state or where it can be established that the plaintiff is holding on to the property merely for investment purposes. On the other hand if the plaintiff intends to continue to occupy it and to repair the damage the proper measure is clearly the cost of all such repairs.

Now in the present case the plaintiff had elected to occupy and to carry out all necessary repairs. She moved out of the property only one year ago not because of the floods but for "personal reason" of which this Court has no knowledge. It is also relevant to note that upon her shifting out of the premises, she let it out to a third party. The ownership and possessory rights attached to such ownership still remain with her. Indeed the evidence adduced in the present case dehorts any suggestion that the plaintiff is merely holding on to the premises as an investment. In this connection it is to be noted that the Chester Ho's report was obtained for the purpose of establishing the repair costs while the Thn'g's report was compiled solely to support the plaintiff's claim in this action. Under the circumstances I am not satisfied that the plaintiff can claim for damages arising from diminution in the value of her property. The proper measure of damage to apply in the present case is to take the costs of all repairs or reinstatements. Now the plaintiff has been paid a sum of RM42,000 pursuant to the consent order of Court dated 29 October 1987 as special damages for the repairs of the premises. This amount is less than the actual amount which her engineer Chester Ho had stated in his Report P2 where the sum of RM54,000 is mentioned as the total costs of all repairs. The plaintiff said in her evidence that she accepted this lesser sum in order to facilitate the settlement of the special damages. At that time no doubt she had in mind that she could still claim under the diminution value of her property. However that may be the sum of RM42,000 was paid pursuant to a consent order of the Court and I cannot disturb that consent order. The plaintiff also stated in her evidence about the cracks caused to the toilet bowls which were caused by the floods occurring in 1989 and the costs of repair of the toilet bowls were not therefore included in the Chester Ho's Report, P2. That being so I agree that she should be paid for the repairs or replacement of the toilet bowls. As the costs of such repair or replacement have not been stated in the pleadings and/or in evidence I am not in a position to state the proper amount to be paid to the plaintiff for this item of damage. I therefore invite Counsel to address me on this matter. As the plaintiffs has not totally failed in her claim for de-valuation of damages, the proper order to make as regard to costs is that each party to pay her and its own costs.